

April 1, 1972

MEMORANDUM TO COUNSEL

Following a discussion among counsel for various cigarette manufacturers of the text and background of the form of "Agreement Containing Consent Order to Cease and Desist" entered into by various manufacturers with the Federal Trade Commission in early 1972, requiring a specified form of disclosure of the Congressional warning statement in cigarette advertising, the interpretations set forth in this memorandum were recommended as appropriate guidelines for individual companies to consider in order to assure compliance with that Consent Order.

These interpretations are according to the order of the sections of the Consent Order to which each relates:

1. Interpretation No. 1--Subsection C-3.

The placement of the warning statement in an advertisement which occupies part of each of two or more pages in any newspaper, magazine, or other periodical is controlled by the last sentence of Subsection C-3, which requires the warning statement to appear on that page which contains the greater (or greatest) part of the advertisement. In the event that a picture of a cigarette package is depicted only on a page, other than the page containing the

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greater (or greatest) part of the advertisement, that display of a cigarette package would not affect the determination of the placement of the warning. The warning in that instance should not be placed on the page containing the picture of the package.

The same principle should control the placement of the warning in the case of an advertisement which has different portions appearing on the same page in any newspaper, magazine, or other periodical. Thus the warning should be placed in the portion of the advertisement which contains the greater (or greatest) part of the advertisement, regardless of the presence or absence of a package depiction in any portion of the advertisement.

2. Interpretation No. 2--Subsection C-5.

Subsection C-5 of the Order contains no exception in the case of a newspaper printed on colored stock, which is neither white nor off-white. Accordingly, in the case of a newspaper so printed, the Order would require that the warning still be printed in black on white.

Similarly, no exception is made for newspapers, magazines, and periodicals which are printed other than in black ink, e.g., green or red. Accordingly, the warning statement should be printed in black ink against a solid white background in those newspapers, magazines, and periodicals.

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(Samples have been examined of various sports events official programs which are printed in blue and red. These appear to contain no black. On the other hand, these samples contain instances in which an almost solid blue is combined with red and creates a shade that closely approaches black. The application of the recommended interpretation might permit some leeway in which a white box is contained, with the rule and the warning statement printed in the darkest combination. All such instances preferably ought to be cleared with the FTC Staff. Absent such compliance clearance it would appear that the requirements of Subsection C-5 will prevail.)

3. Interpretation No. 3--Subsection C-6.

In terms of the normal language of advertising, the word "superimposed" appearing in the last sentence of Subsection C-6 should be interpreted to read "mortised."

4. Interpretation No. 4--Subsection C-7.

In the first sentence of Subsection C-7, the word "margin" means "that part of a page outside of the main body of printed or written matter; the part outside the text at either side and at the top and bottom." (Definition of margin applicable to printing contained in Webster's New International Dictionary of the English language, Second Edition, Unabridged.) Accordingly, the warning statement

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may not be placed in any small white area which is "outside of the main body" of the advertisement.

Where in a colored advertisement, the format contains a portion printed in color and a lower white area occupying not less than thirty percent of the trim size, the warning statement in its rectangle may be positioned in that lower portion, provided there is compliance with the second sentence of Subsection C-7 and of Subsection C-5. In all cases the warning statement in its rectangle should be separated from and not contiguous to any statement of "tar" and nicotine.

5. Interpretation No. 5--Subsection C-7.

The term "immediately contiguous to" in the second sentence of Subsection C-7 is to be interpreted as "very near, although not in contact with."

6. Interpretation No. 6--Section D.

There are some billboards which present two or more different messages sequentially within a short period of time, or which present different messages to different viewers depending upon the viewer's distance from the billboard, at the same time. As to billboards of either of these types, Section D should be interpreted as requiring that each message visible to any consumer at any given time be treated as a separate advertisement requiring a warning.

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statement of a size determined in accordance with the provisions of Section D.

7. Interpretation No. 7--Section D.

The term "proportionately corresponding," in Section D, in connection with the "size, shape, contrast and placement" of the rectangle and enclosing rule on billboard disclosures of the warning statement, means that the distance between the warning statement type block and the sides and top and bottom of the enclosing rectangle shall be directly proportionate to that employed with a warning statement in 16-point type in a newspaper, magazine, or other periodical advertisement which is specified in Subsection C-4. In like fashion, the width of the rule should be directly proportionate to that employed with a warning statement in 16-point type in a newspaper, magazine, or other periodical advertisement which is specified in Subsection C-4. Attached to this memorandum is Table 1, containing the recommended distances between the type block and the enclosing rule, and the width of the rule for various types of billboards which have been determined in accordance with this interpretation of "proportionately corresponding."

Where a poster utilized as an advertisement, and sometimes called "king size" or "queen size," is larger than a public transit size card, the type size of the

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warning statement should be similarly proportionalized rather than simply included by analogy to the type size required for 1-sheet billboards in Section D.

8. Interpretation No. 8--Section E.

The term "point-of-sale promotional materials exhibited to cigarette purchasers" is interpreted to mean materials containing cigarette advertising which are "displayed inside of stores and other places of business selling cigarettes." (This latter language in quotations appears on page 1 of the "Explanatory Memorandum Relating to Voluntary Program for 'Tar' and Nicotine Disclosure," which was forwarded to the Federal Trade Commission on December 17, 1970.)

Point-of-sale promotional materials placed in military exchanges and commissaries located abroad and patronized primarily by members or units of the Armed Forces of the United States located abroad should bear the specified warning statement. (This appears to be a desirable interpretation even though not specifically covered by Section D.)

9. Interpretation No. 9--Section E.

In determining whether point-of-sale promotional materials in solid shapes, such as cubes, rectangles, spheres, lanterns, clocks, etc., "have a surface containing an advertising display area of more than 36 square inches" within the meaning of the first sentence of Section E, the following

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test should be observed: If more than 36 square inches of one or more surfaces of the object containing the advertisement are visible to a person of normal vision standing at any position in relationship to the object containing the advertisement, then a warning statement is required.

10. Interpretation No. 10--Section E.

If promotional materials are offered or given to consumers at a place at which the materials would be considered "point-of-sale promotional materials" if they were merely exhibited but not given to cigarette purchasers (as in Interpretation No. 8, supra), then a warning statement is required for those promotional materials so offered if they have a surface containing an advertising display area of more than 36 square inches. The exemption contained in the first part of the last sentence of Section E is not interpreted as exempting these promotional materials.

11. Interpretation No. 11--Section F.

The term "direct mail circulars," appearing in Section F, shall include solid objects such as ashtrays, which are made from materials other than paper, and which contain cigarette advertising, and which are mailed to consumers.

12. Interpretation No. 12--Section H.

The phrase "corporate or other financial reports" in Section H shall comprehend cigarette advertising such as

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a dividend notice even though such financial notices do refer to the cigarette brands produced by the respondent company, and therefore no warning statement need be included.

13. Interpretation No. 13--
Coverage of Entire Order.

The Order does not require the inclusion of a warning statement in cigarette advertising which (1) is not paid for in whole or in part, directly or indirectly, by a cigarette manufacturer, and (2) is prepared without the assistance of a respondent cigarette manufacturer.

14. Interpretation No. 14--
Geographical Coverage.

Section 4 of the Federal Trade Commission Act, as amended, appears to relate only to acts within "any territory of the United States." Accordingly, the Order as a whole would appear to be applicable to Guam and the Virgin Islands. A fair argument could be made that the Commonwealth of Puerto Rico is not included. On the other hand, the voluntary "tar" and nicotine program does extend to Puerto Rico. It is recommended that the Order be interpreted to cover Puerto Rico.

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